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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~696~~ 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,
Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,
Defendants-Appellees.

MOTION TO AFFIRM

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November 5, 1969

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MOTION TO AFFIRM

The Appellees, comprising the Supreme Court of the State of New York, Appellate Division, First and Second Judicial Departments, the judges thereof, the Committees on Character and Fitness of those Departments, and the members thereof, move for summary affirmance of the

judgment entered on June 16, 1969 by the Statutory Court of the United States District Court for the Southern District of New York (Friendly, Cir. J.; Bonsal and Motley, D.JJ.).

Jurisdiction

These two actions, commenced in July, 1968, were ordered to be heard before a statutory District Court of three judges pursuant to 28 U.S.C. § 2281 (see 5a-13a),* since the complaints sought an injunction prohibiting the enforcement, on constitutional grounds, of New York statutes and rules.

On November 13, 1968 a hearing was held before a three-judge court, consisting of Circuit Judge Henry J. Friendly and District Judges Dudley B. Bonsal and Constance Baker Motley. At that time the two actions were consolidated for hearing, and argument was heard on the plaintiffs' motion for a temporary and permanent injunction and defendants' motion to dismiss the complaints.

In an opinion filed on February 17, 1969 (14a-78a) the District Court concluded that the statutes and rules under attack were constitutional on their face as construed by the New York Courts, except that three questions then contained in the questionnaire submitted to applicants for admission to the Bar were defective in certain respects. The Court deferred entering judgment for 90 days in order to give the defendant New York Courts an opportunity to review the opinion and submit a statement as to the changes being contemplated in the form of questionnaire. That report was submitted on May 14, 1969 (R. Doc. No. 24) and thereafter final judgment was entered on June 16, 1969 (79a-82a).

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* Reference to pages followed by "a" are to the appendix to the Jurisdictional Statement.

A notice of appeal to this Court was filed by appellants on August 8, 1969 and the Jurisdictional Statement was received by appellees on October 6, 1969. This motion is being filed within 30 days, on November 5, 1969.

Statutes and Rules Involved

The basic framework of New York's procedures governing admission to the Bar is contained in the statutes and rules involved in this appeal.

Section 90 of the New York Judiciary Law (quoted at 2a-3a) provides that the Appellate Divisions of the New York Supreme Court shall admit individuals who have been certified by the state board of law examiners as having passed a written examination, after the responsible Appellate Division is satisfied that the applicant "possesses the character and general fitness requisite for an attorney and counsellor-at-law".

This mandate is implemented by the Rules of the New York Court of Appeals governing admission of attorneys, particularly Rule VIII (quoted at 3a-4a). That Rule requires an applicant to produce before a Committee on Character and Fitness, appointed by the Appellate Division, affidavits of two persons attesting that the applicant possesses "the good moral character and general fitness requisite for an attorney and counselor-at-law", and that such affidavits shall contain the opinion by the affiants of the applicant's good moral character and the facts upon which such opinion is based.

The New York Civil Practice Law and Rules, in Rules 9401, 9404 and 9406 (quoted at 1a-2a) provide for the appointment of a committee of lawyers by each Appellate Division (the Committees on Character and Fitness) "for the purpose of investigating the character and fitness of every applicant for admission" to the Bar. Rule 9404 authorizes these committees, with the approval of the Ap-

pellate Divisions, to proscribe a form of questionnaire to be completed by each applicant, which shall include such data as is necessary for the committees to pass upon the qualification of the applicant, including the applicant's residence in New York.

Rule 9406 provides that no one shall be certified for admission to the New York Bar unless the applicant furnishes satisfactory proof of United States citizenship, New York residence, compliance with the applicable rules governing admission, and "that he believes in the form of the government of the United States and is loyal to such government".

Implementing the delegations and restrictions contained in the foregoing statutes and rules, the Committees on Character and Fitness, and the Appellate Divisions to which they report, have promulgated a form of questionnaire for each judicial department. The form of questionnaire in the first and second judicial departments, whose courts and committees are appellees here, is now uniform. The two questions contained in the questionnaire now involved in this appeal deal with the implementation of the mandate of Rule 9406 concerning belief in and loyalty to the United States government. Those questions read as follows:

> "26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> "(b). If your answer to (a) is in the affirmative, did you, during the period of such membership or as-

sociation, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State of any political subdivision thereof by force, violence or any unlawful means?

"27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitution of the United States and of the State of New York? If there is, please explain.

"(b). Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?"

The questions themselves, involving only applications to the Bar within a local area, and not of state-wide scope, are arguably not themselves involved in this appeal (see, *e.g.*, *Moody* v. *Flowers*, 387 U. S. 97) but the questions are pertinent in construing the meaning and scope of Rule 9406.

Questions Presented

1. May the New York Courts constitutionally impose, as a condition for admission to the Bar, a requirement that applicants demonstrate that they possess "the character and general fitness requisite for an attorney and counsellor-at-law", when such a requirement has existed for many years and has been construed repeatedly by the New York Courts?

2. May the New York Courts, and Committees on Character and Fitness appointed by them, in an attempt to establish whether applicants for admission to the Bar can in good faith take an oath of support to the United States Constitution, inquire as to their affiliation with or-

ganizations advocating the violent overthrow of the United States government, when such inquiry is limited to organizations in which they participated with the specific intent to further such aims?

3. Is a statutory directive to the New York Courts constitutional which directs that no person shall be admitted to the Bar unless "he believes in the form of the government of the United States and is loyal to such government", when the New York Courts have construed this directive merely to require that an applicant answer inquiries concerning his willingness to subscribe to the oath of support for the Constitution?

Statement of Facts

Prior to the commencement of these actions the Appellate Divisions of the First and Second Judicial Departments had substantially altered the forms of questionnaire submitted to applicants, and thus the attacks made in the complaints, and the questionnaires annexed as exhibits to the complaints, were already obsolete. Following the commencement of these actions the defendant Appellate Divisions reviewed the new uniform form of questionnaire and voluntarily eliminated some of the remaining questions.*

The three-judge District Court found that the statutes and rules under attack, as construed by the defendant New York Courts, were constitutional, but the Court did consider three of the questions in the form of questionnaire defective. One question, number 26, has been re-

* The questions eliminated, which asked for a listing of all organizations of which the applicant had been a member (see 32a n. 6), might have involved the issues now before this Court in *Baird* v. *State Bar,* No. 53, and in *In re Stolar,* No. 75. Elimination of those questions removes any overlapping issues between those cases and this appeal.

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drafted to comply with the objections noted by the District Court (35a-37a) and in fact the redrafting gives more specificity to the question than even the District Court required, as is now apparent from question 26(b).

Question 27(a), which dealt with belief in the form of government of the United States, was redrafted by the Appellate Divisions (R. Doc. No. 24), and further revised by the District Court in its judgment (see 82a). Question 31, found defective by the District Court (37a), was deleted without objection by the Appellate Divisions.

The Motion to Affirm Should Be Granted

I

The statutes and rules under attack are claimed to be unconstitutionally broad and vague on their face, or more appropriately, as construed by the New York Courts responsible for their interpretation and administration. No basis exists in the record to consider any attack upon these statutes as applied, since these actions proceeded to judgment merely upon motion for an injunction, without any evidence being submitted other than the contested allegations of the complaints.

Appellants attack Section 90 of the New York Judiciary Law claiming that the phrase "character and general fitness requisite for an attorney and counsellor-at-law" is unconstitutionally vague, and that the requirement of establishing good moral character places an unconstitutional burden of proof upon the applicant.

This Court has already noted that the requirement of good moral character is a basic criterion for admission to the Bar of all States, and that it is a "requirement whose validity is not, nor could well be, drawn in question here." *Konigsberg* v. *State Bar*, 366 U. S. 36, 41. New York has not limited the requirement to "good moral character" but

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has restricted the test to the character requisite for an attorney, giving this phrase specific content and definition over a period of many years in the decisions of its courts. See 22a, 63a n.20.

The argument concerning the burden of proof is specious, since the statute merely requires that the Appellate Division satisfy itself of the character and fitness of each applicant. Rule VIII of the Court of Appeals Rules merely establishes a burden upon an applicant of coming forward with affidavits by two persons who know the applicant sufficiently to attest to his good moral character—a burden which is no less stringent than the requirements for admission to the Bar of this Court, and involving a phrase of greater precision than "private and professional character" contained in Rule 5 of the Rules of this Court.

In the implementation of Section 90 and Rule VIII the necessity for an applicant to demonstrate his good moral character has consistently been treated as a valid condition for admission to the Bar. *Konigsberg* v. *State Bar*, 366 U. S. 36, 42; *Konigsberg* v. *State Bar*, 353 U. S. 252, 262-63; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239; *Matter of New York County Lawyers Assn.*, 4 Misc. 2d 728 (Sup. Ct. 1956), *aff'd*, 3 A. D. 2d 742, *aff'd*, 3 N. Y. 2d 224, *appeal dismissed for want of substantial federal question sub nom. Roeb* v. *New York County Lawyers Assn.*, 355 U. S. 604.

II

Appellants also challenge the provision of Rule 9406 of the New York Civil Practice Law and Rules which mandates that the Committee on Character and Fitness shall not certify a person for admission unless the applicant furnishes satisfactory proof "that he believes in the form of the government of the United States and is loyal to such government." Appellants treat this provision as if it were a statute directed at every applicant, whereas the

Rule is merely a delegation of authority to each of the Committees on Character and Fitness, and the Appellate Divisions to which they report. Whatever vagueness may be found in a mere reading of this Rule is clearly eliminated by the interpretation of that Rule as implemented by the Committee in the questionnaire submitted to each applicant. An individual applicant for admission to the Bar need be concerned only with the specific questions implementing Rule 9406 as set forth in the questionnaire. The questions certainly pass muster as precise and within the permissible scope of the Committee's inquiry.

The mandate of Rule 9406, as interpreted by the New York Courts and by the District Court (26a), constitutes merely a test of whether the applicant can subscribe in good faith to the constitutional oath of office required of attorneys in New York (New York Const., Art. XIII, § 1). That oath has already been upheld by this Court in *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd mem.*, 390 U. S. 36 (1968).

Again, appellants argue that Rule 9406 imposes an unconstitutional burden of proof upon every applicant, although there is no evidence whatsoever in the record to refute the conclusion of the District Court that the burden here is merely one of initially coming forward with some evidence. See 23a.

III

The Jurisdictional Statement focuses almost exclusively upon questions deleted from the form of questionnaire, either before the commencement of these actions or prior to the hearing before the three-judge Court. In fact, the only questions pertinent on this appeal are the revised questions sustained by the District Court in its judgment, both of which deal with the inquiry into the applicant's ability to subscribe to the constitutional oath. This Court has already suggested, in *Bond* v. *Floyd*, 385 U. S. 116, 132, that a State need not accept a *pro forma* oath of sup-

port for the Constitution, and some legitimate inquiry into the good faith of the oath taker is thus appropriate.

The actual oath is administered periodically to classes of applicants in the admission ceremonies conducted before the Appellate Divisions. In order to avoid the difficulty of having one individual demur to the taking of that oath at the very moment prior to admission, the Committees on Character and Fitness and the Appellate Divisions before this Court have proposed two questions, 26 and 27 (*supra*, pp. 4-5) for the purpose of determining the *bona fides* of the applicants in swearing to support the Constitution.

Question 26 is now limited to an inquiry concerning the applicant's affiliation with organizations which he *knew* advocated the violent overthrow of the government, and further limited to situations in which the applicant embraced the specific intention to further those unlawful aims. As so limited, the question meets the standards found lacking by this Court in *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Elfbrandt* v. *Russell*, 381 U. S. 11, and *Aptheker* v. *Secretary of State*, 378 U. S. 500. Unlike those cases, however, here there is no proper claim that an applicant would necessarily be denied admission to the Bar by answering this question in the affirmative, since the Committee might well conclude that specific intent to advocate violent overthrow is still not sufficient absent a showing of imminent lawless action. See *Brandenburg* v. *Ohio*, 395 U. S. 444. In any event, in the absence of any suggestion upon the record that the question as now formulated sweeps within its scope conduct which is constitutionally protected even from inquiry, there is no reason why the judgment of the District Court should not be summarily affirmed.

IV

Finally, question 27 cannot fairly be challenged on the ground of vagueness or overbreadth. Question 27(a) as drafted by the District Court merely asks the applicant

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if there is any reason why he cannot subscribe to an oath supporting the Constitutions of the United States and the State of New York. The Committees on Character and Fitness are obviously entitled to know, in advance of the class admission date, what reason any given applicant might have for refusing to take that oath. The oath itself is of course one that is virtually identical to the oath taken by each member of this Court, by the President of the United States (U. S. Const., Art. II, § 1), and probably by every member of the Bar of every State.

Question 27(b) is nothing more than a repetition of the oath, and no more susceptible to constitutional attack. *Knight* v. *Board of Regents, supra.*

CONCLUSION

The statutory scheme attacked here is clearly permissible under the decisions of this Court, and no reason exists for assuming that the Courts of New York, and the distinguished lawyers appointed by those Courts to serve on the Committees on Character and Fitness, will not implement these procedures in accordance with the decisions of this Court and with due regard for the rights of every applicant. The questions asked of applicants in the First and Second Judicial Departments of New York are precise, unambiguous, and no broader than is absolutely necessary in order to satisfy the New York Courts that each applicant possesses the character and general fitness requisite for an attorney and counselor-at-law of the State of New York.*

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*Appellants' other attack, namely that the affidavits required of sponsors constitute an invasion of the privacy of applicants, is answered simply by a reading of the affidavits (R. Doc. No. 17). They merely ask for the facts which serve as the basis for the sponsor's conclusion that the applicant is a person of good moral character, and also serve to corroborate the applicant's claim of New York residence.

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The judgment appealed from should be affirmed.

Respectfully submitted,

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